

STATE OF MICHIGAN
COURT OF APPEALS

BURTON INDUSTRIES, INC.,

Plaintiff-Appellee,

v

ATLAS TECHNOLOGIES, INC.,

Defendant-Appellant.

UNPUBLISHED

May 11, 2006

No. 259052

Genesee Circuit Court

LC No. 03-077902-CK

Before: Schuette, P.J. and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for entry of an order of satisfaction of judgment and for release of garnishment. We affirm.

Plaintiff filed suit against defendant after defendant failed to pay for equipment that was manufactured and delivered by plaintiff to defendant pursuant to a purchase order. Plaintiff sought to obtain the full contract amount of \$192,675. Shortly after plaintiff filed suit, the parties entered into a consent judgment, whereby plaintiff agreed to accept \$171,000 from defendant in three installments: (1) \$85,500 on or before December 19, 2003; (2) \$42,750 on or before January 19, 2004; and (3) \$42,750 on or before February 19, 2004. The consent judgment specified that "[a]ll payments shall be made payable to Burton Industries, Inc. at the offices of Burton Industries." The consent judgment also contained the following default clause:

Should Defendant default by failing to make any payment when due, the entire original balance of \$192,675 shall be due less any payments previously made pursuant to this judgment by Defendant and that remaining amount shall be payable as a judgment forthwith and the Plaintiff may have immediate execution thereon.

The consent judgment also specified that upon receipt of the final payment, plaintiff was to file a satisfaction of judgment with the trial court.

On December 19, 2003, with plaintiff's consent, defendant sent a facsimile to its bank authorizing a wire transfer of \$85,500 to plaintiff's bank account. Defendant's bank completed the transaction on that date, and plaintiff admits that the December 2003 payment was timely. On January 19, 2003, defendant again sent a facsimile to its bank and requested the transfer of \$42,750 to plaintiff's bank account. Defendant's bank did not wire any funds to plaintiff's bank

that day, however, because it was a federal holiday and the bank was closed. Defendant's bank also failed to transfer any funds to plaintiff's bank the following business day, but did transfer the funds on January 21, 2004. Plaintiff considered the payment untimely and, on January 23, 2004, plaintiff obtained a writ of garnishment directed to HSBC Bank – Marine Midwest Bank for \$64,939.52, the amount of unsatisfied judgment due on the default amount of \$192,675. HSBC Bank failed to file a garnishee disclosure, and no payment was made to plaintiff.

On February 19, 2004, defendant timely made a payment of \$42,750 via wire transfer to plaintiff's bank account. Plaintiff did not file a satisfaction of judgment. In April 2004, plaintiff sought and obtained a writ of garnishment for Citizens Bank in the amount of \$21,942.80, the amount outstanding against the default judgment of \$192,675. This writ was served on defendant by Citizens Bank. Defendant did not object, and Citizens Bank subsequently paid \$15,755.06 to plaintiff. Plaintiff later obtained a writ of garnishment for General Motors Corporation in the amount of \$5,924.94, the remaining outstanding amount. This writ was served by General Motors on defendant, and defendant objected to the garnishment and sought an order from the trial court to release the garnishment and deem the consent judgment satisfied. The court declined to issue the requested order, leading to this appeal.

Defendant first argues that it timely made the January 19, 2004, payment when it faxed a request to its bank on that date, directing a wire transfer of funds to plaintiff's account. The trial court disagreed. We review a trial court's decision to enforce a consent judgment for an abuse of discretion. See *Trendell v Solomon*, 178 Mich App 365, 370; 443 NW2d 509 (1989). However, the rules of contract interpretation apply to consent judgments. *Young v Robin*, 146 Mich App 552, 557-558; 382 NW2d 182 (1985). And the proper interpretation of a contract constitutes a question of law subject to de novo review. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

The primary goal in constructing or interpreting contracts is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The question of whether contract language is ambiguous is a question of law, and if contract language is clear and unambiguous, its meaning is also a question of law. *Id.* Ambiguity exists only where words in a contract may reasonably be understood in different ways, and courts may not create ambiguity where none exists. *Id.* Words in a contract must be interpreted according to their common meanings, and their plain meaning may not be distorted. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354-355; 596 NW2d 190 (1999).

The consent judgment provided that \$171,000 “shall” be payable in three installments: (1) \$85,500 on or before December 19, 2003; (2) \$42,750 on or before January 19, 2004; and (3) \$42,750 on or before February 19, 2004. It further provided that if defendant failed to “make any payment when due, the entire original balance of \$192,675 shall be due less any payment previously made pursuant to this judgment. . . .” The plain and ordinary meaning of the word “shall” requires mandatory action. *AFSCME v City of Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005). Thus, under the consent judgment, it was mandatory that the sum of \$42,750 was to be paid *on or before* January 19, 2004, and it was mandatory that the entire original balance of \$192,675 would be owed if defendant failed to make any payment when due. Defendant argues that a payment is “made” when the facsimile for a wire transfer is sent to the bank. In the context of this contract, “mak[ing]” a payment “when due” plainly means

delivering the payment to plaintiff *on or before* the specified dates; to construe the word otherwise would create an ambiguity in the contract where none exists.

We reject defendant's argument that there was a course of dealing between the parties establishing that the mere request for a wire transfer sufficed as timely payment. Actual delivery is required unless "the creditor's express direction or assent" or "facts from which such direction or assent may be inferred" support a course of dealing argument. *Birznieks v Cooper*, 405 Mich 319, 328-329; 275 NW2d 221 (1979). A "course of dealing" involves a "sequence of previous acts and conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Black's Law Dictionary (5th ed). In this case, the record does support that the parties established a common understanding that a request by defendant to its bank to transfer funds would be sufficient to comply with the requirement of payment "on or before" each due date. Before the default, defendant had made only one timely payment by way of a wire transfer.

Under the plain and unambiguous language of the consent judgment, the trial court properly determined that defendant failed to "make" a timely payment on January 19, 2004. We affirm the trial court's ruling in that regard.

Defendant also argues that the default provision should not be applied because defendant substantially complied with the terms of the consent judgment. We disagree.

Where time is not of the essence to a contract, a short delay in payment, which does not result in detriment to the payee, may constitute substantial performance of the contract. *A E Giroux, Inc v Contract Services Assoc, Div of Premium Corp of America, Inc*, 99 Mich App 669, 670-671; 299 NW2d 20 (1980). Where time is of the essence, however, "the stipulation as to the time must be observed." *Nedelman v Meininger*, 24 Mich App 64, 74; 180 NW2d 37 (1970). Time is of the essence in a contract if the contract states that time is of the essence, if it clearly appears that the parties intended time to be an essential element of their agreement, or if intent must necessarily be implied based on the nature of the contract and surrounding circumstances. *Id.*; *MacRitchie v Plumb*, 70 Mich App 242, 246; 245 NW2d 582 (1976). The exact words "time is of the essence" are not required to make time of the essence; "[a]ny words which show that the intention of the parties is that time shall be of the essence . . . will have that effect." *Friedman v Winshall*, 343 Mich 647, 656; 73 NW2d 248 (1955), quoting 12 Am Jur, Contracts, § 311, p 866.

When plaintiff filed suit in this case, it sought to recover the full sum owed under the parties' original contract. To settle the matter, the parties entered into a consent judgment for a lesser amount and specified mandatory payment dates. A default clause providing for payment of the greater amount in an accelerated fashion if payment was not timely made was also agreed upon by the parties. The fact that the judgment required payment of designated sums on specified dates and provided a clear sanction upon default leads to the conclusion that time was of the essence. The inclusion of the default provision demonstrates that timeliness of payments was important to the agreement.

Because time was of the essence and the January 2004 payment was not timely made, defendant was not entitled to relief from its obligation to pay the amount set forth in the default provision. While January 19, 2004 was a federal holiday, both plaintiff and defendant were apparently open for business that day, and both businesses are located in the same county.

Defendant could have made its payment before January 19, 2004 to ensure its timeliness, or it could have hand delivered payment on the date due. Defendant did not take adequate measures to ensure that its payment was timely made. Defendant also did not ensure that payment was made on the following business day, January 20, 2004. Plaintiff did receive the money two business days after the due date, and while two days may seem inconsequential, where, as here, the contract requires timely payment, two days is sufficient delay to invoke the default provision. Enforcing the consent judgment as written is neither unconscionable nor unreasonable. The trial court did not abuse its discretion in enforcing the consent judgment as written.

Defendant lastly argues that the trial court should have determined that plaintiff waived its right to enforce the default provision when it accepted both the late payment and the February 19, 2004, payment, and failed to immediately execute on the default amount. A trial court's ruling on an equitable issue is reviewed de novo. *Dyball v Lennox*, 260 Mich App 698, 703; 680 NW2d 522 (2004).

Waiver is an equitable doctrine, which is applied judicially to avoid injustice. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 74; 642 NW2d 663 (2002) (Kelly, J. dissenting). A waiver is the intentional and voluntary relinquishment of a known right. *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). A waiver may be express or implied. *Joba Constr Co v Monroe Co Drain Comm'n*, 150 Mich App 173, 178; 388 NW2d 251 (1986). "[C]onduct that does not express any intent to relinquish a known right is not a waiver, and a waiver cannot be inferred by mere silence." *Moore, supra* at 376. Waiver may be implied, however, by conduct inconsistent with the intent to assert a right. 28 Am Jur 2d, Estoppel and Waiver, § 209, pp 612-613.

Generally to make out a case of implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party demonstrating the relinquishment of the right. So, mere silence is no waiver unless there is an obligation to speak, or if the silence or inaction is for so long a period as to show intention to yield a known right. Mere passivity may not support waiver. Inaction, to be interpreted as intention of waiver, must generally be accompanied by other circumstances, such as unreasonable length of time, evidencing intent. *[Id.]*

A party may waive any of its contractual rights. *Joba Constr, supra* at 178-179.

In this case, two days after the untimely January payment, plaintiff sought to garnish the accelerated amount from HSBC Bank. While it is not clear from the record why the bank failed to effectuate this garnishment, it is clear that plaintiff had no intention of waiving its right to enforce the default provision. Plaintiff accepted the February payment, but clearly did not consider the payment to be a final payment, because plaintiff never filed the required satisfaction of judgment upon receipt of payment. Further, defendant never moved the trial court to enforce that provision of the consent judgment. Two months later, plaintiff obtained new writs of garnishment from the trial court against Citizens Bank. Defendant does not dispute that Citizens Bank served a writ of garnishment on defendant and that Citizens Bank paid plaintiff without objection by defendant. Plaintiff subsequently obtained another writ of garnishment for the remaining outstanding amount. Only then, in September 2004, did defendant take any action with respect to plaintiff's actions in enforcing the default amount.

Waiver is an equitable doctrine, and here the trial court balanced the equities and determined that defendant's waiver argument would not preclude plaintiff from obtaining the default amount. We find no error with this decision. Under the terms of the consent judgment, plaintiff had the option of seeking immediate enforcement of the default provision, but it was not required to do so. The default provision provided that plaintiff "may" have immediate execution on the default amount. The term "may" is a permissive, not mandatory, term. *AFSCME, supra*. Plaintiff's first attempt to garnish the default amount was unsuccessful and, thereafter, plaintiff offset the default amount by the payments that defendant made. When plaintiff did not file a satisfaction of judgment after the February 19, 2004, payment, defendant should have been on notice that plaintiff did not consider the judgment satisfied. Further, defendant knew of plaintiff's attempt to collect under the default provision no later than May 7, 2004, when defendant was served with the writ of garnishment by Citizens Bank. Defendant did not object and allowed Citizens Bank to pay on the garnishment. We agree that there is no basis for concluding that plaintiff's conduct after the untimely January payment expressed an intent to relinquish the right to collect the default amount. Under the facts and circumstances of the case, the trial court correctly balanced the equities and determined that the waiver doctrine did not apply to preclude plaintiff from seeking to collect on the default amount under the consent judgment.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper